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In the Supreme Court of the United States

No:

HELEN HELLMAN,
Petitioner

vs.

THE UNIVERSITY OF PITTSBURGH, and
JEROME ROSENBERG,
Respondents

Petition For Certiorari

PETITION FOR CERTIORARI FROM AN ORDER AND OPINION ENTERED BY THE THIRD CIRCUIT COURT OF APPEALS ON FEBRUARY 8, 1985 AT NO. 84-3446 AFFIRMING AN ORDER OF COURT DATED June 29, 1984, OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PA AT C.A. NO. 83-2678

FELDSTEIN GRINBERG STEIN
& McKEE
STANLEY M. STEIN, ESQUIRE
428 Blvd. of the Allies
Pittsburgh, PA 15219
412/471-0677
Counsel for Petitioner

Counsel for Respondents:
JAMES J. RESTIVO, JR., ESQ.
MARTHA H. MUNSCH, ESQ.
MICHAEL J. BETTS, ESQ.
REED SMITH SHAW & McCLAY
747 UNION TRUST BUILDING
PITTSBURGH, PA 15219

STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Where two people, one male and one female in the same faculty department, are both notified that they will not receive tenure, and where the decision as to the male is subsequently reviewed by one process while the female is instructed to follow a different review process, and where, following these review processes, the male receives tenure but the female does not, does the time within which the female must file her EEOC complaint begin to run *before* the date on which the male receives tenure?

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OPINIONS BELOW

The United States Court of Appeals for the Third Circuit issued a Memorandum Opinion which was submitted under Third Circuit Rule 12(6) on February 8, 1985, and filed on February 13, 1985. A copy of this Memorandum Opinion is contained in the Appendix hereto at pages 1-a - 9-a. The United States District Judge issued a Memorandum Opinion on June 29, 1984. A copy of that Memorandum Opinion is contained in the Appendix hereto at pages 10-a - 20-a.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 United States Code §1254(1), wherein it is provided, *inter alia,* that cases in the Courts of Appeals may be reviewed by the Supreme Court by Writ of Certiorari granted upon the Petition of any party to any civil or criminal case before or after rendition of judgment or decree.

Petitioner, Helen Hellman, seeks review of the Memorandum Opinion issued by the United States Court of Appeals for the Third Circuit on February 8, 1985, and filed on February 13, 1985.

STATUTES INVOLVED IN THIS CASE

Title 42 United States Code Section 2000e-5(e):

(e) Time for filing charges. A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be file by the Commission with the State or local agency.

STATEMENT OF THE CASE

On February 28, 1972, Petitioner herein, Helen Hellman (Hellman), a female member of the French Department of the Respondent University of Pittsburgh (University), and Benjamin Hicks (Hicks), a male member of the same department, were both advised by Respondent Jerome Rosenberg (Rosenberg) that they would not be granted tenure and that their employment would terminate at the end of the 1972-1973 academic year (Appendix, pp. 37-a, 38-a).

The tenured faculty of the French Department had previously recommended, by a vote of 7-0 with one abstention, to grant tenure to Hellman (App., p. 33-a). The tenured faculty had also voted to recommend tenure to Hicks, but only by a vote of 6-3 (App., p. 34-a). In other words, Hellman was considered qualified by more of her peers than Hicks for tenure.

Hellman requested that Rosenberg reconsider his decision and she submitted new information to him (App., p. 35-a), but on March 28, 1972, Rosenberg mailed an "official notification" of his tenure denial to Hellman (App., p. 37-a).

Hicks also requested that Rosenberg reconsider the February 14 refusal of tenure, and Rosenberg agreed to do so, as he had done with Hellman (App., p. 38-a).

Unlike Hellman, however, Hicks was successful in having Rosenberg reconsider his previous decision and on March 28, 1972, Rosenberg recommended to the University Provost, Rhoten Smith, that Hick receive tenure (Id.).

Smith, however, refused to accept the Rosenberg recommendation and, in a letter dated April 26, 1972, he

instructed Rosenberg to advise Hicks that tenure had been denied. (App., p. 40-a).

Smith wrote that "... while Dr. Hicks appears to have performed some services for the department acceptably, the overall record of performance just does not convince me of the kind of general strength we can and ought to expect before granting tenure .... I believe we should be rigorous in these decisions and extend tenure only when the case is clear and compelling." (Id.) Rosenberg advised Hicks by letter on April 28, 1972, that tenure had been denied him (App., p. 42-a).

A subsequent meeting between Hicks and Smith proved unsatisfactory for Hicks (App., p. 43-a).

As of April 28, 1972, therefore, neither Hellman, the female, nor Hicks, the male had been granted tenure.

Following receipt of Rosenberg's letter, Hellman asked to be advised of the procedures which she should follow to appeal the adverse tenure decision (App., pp. 48-a).

Rosenberg advised her that she had to pursue an appeal through the Faculty Tenure and Promotions Review Board, an appeal which could result only in a non-binding recommendation, not a direct reversal of the tenure denial (App., pp. 49-a to 50-a).

While Hellman was following the appeal procedure which Rosenberg had instructed her to follow, however, Smith, responding to Dr. Walter Albert, a supporter of Hicks within the French Department and in a letter marked "CONFIDENTIAL," advised Albert on how to go about obtaining a review of the Hicks tenure denial (App., p. 44-a).

Smith specifically laid out the criteria on which Hicks would have to offer proof in order to secure a reversal by the provost of the previous tenure denial (Id.).

In a note to Rosenberg on the subject, Smith indicated that he might go so far as to utilize an ad hoc committee for the purpose of taking evidence on the qualifications of Hicks for tenure (App., pp. 46-a to 47-a).

When supporters of Hellman, in March, however, had sought from Smith a similar review of the Hellman tenure denial, Smith had refused (App., pp. 26-a to 28-a).

Instead, on July 12, 1972, although she asked to be advised of any other review process, Hellman was given instructions by Rosenberg on how to invoke the non-binding review of the newly constituted Tenure and Promotions Review Board (App., pp. 49-a to 50-a). Accordingly, she proceeded to follow a procedure which could not result in a reversal of Rosenberg's decision unless he himself decided he wished to reverse it (App., p. 51-a). Rosenberg reiterated these instructions on September 22, 1972, and advised Hellman to meet with him in order to select the members of the review panel (App., p. 52-a).

Hicks, however, was not required to follow the Tenure and Promotions Review procedure. Instead, following a review by Smith, on November 3, 1972, approximately six months after being denied it, he was granted tenure (App., pp. 53-a to 54-a). On December 29, 1972, Chancellor Posvar officially approved the recommendation of the provost and Hicks became a tenured professor, effective retroactively to September 1, 1972 (App., p. 55-a).

As of November 3, 1972, therefore, Hellman, who had been recommended for tenure by her faculty with a higher vote than Hicks, was without tenure, and Hicks, who had

been previously deemed unworthy of tenure by the provost, was a tenured member of the faculty on the provost's recommendation.

As a result of and following the grant of tenure to Hicks, Hellman filed a complaint with the Equal Employment Opportunity Commission (EEOC) on January 26, 1973 (App., p. 30-a), 84 days after Hicks received tenure approval from the provost. This complaint, however, under the law as interpreted by this Court in *Mohasco Corp. v. Silver,* 447 U.S. 807 (1980), could not be considered to have been filed for another 60 days, which means it would have been filed as of 144 days after Hicks was granted tenure.

According to the record, the EEOC deferred the case to the Pittsburgh Commission on Human Relations on February 20, 1973 (App., p. 24-a) and filed it on June 25, 1973 (App., p. 25-a), 234 days after November 3, 1972, the day Hicks received tenure.

Hellman also continued the appeal process that she had been instructed by Rosenberg to follow. On February 6, 1973, a majority of the Tenure and Promotion Review Committee recommended that the adverse tenure decision as to Hellman be reversed and that she be granted tenure (App., pp. 56-a to 63-a).

Rosenberg, however, on March 1, 1973, refused the recommendation of the committee and reaffirmed his denial of Hellman's tenure (App., p. 64-a).

In her EEOC complaint filed on January 26, 1973, Hellman alleged that she was denied tenure while a less qualified male, Hicks, was granted tenure. The date of the filing was less than 240 days after the act which Hellman contends is the discriminatory act in this case—the grant

of tenure to Hicks—for before Hicks was granted tenure there was no apparent discrimination and no difference in the treatment by the University of a female and a male.

Following the filing by Hellman of her federal court complaint, Respondents filed a motion for summary judgment asserting, among other things, that the time within which Hellman was required to file her EEOC complaint began to run on February 28, 1972, or, at the latest, March 28, 1972, the date on which the official written notification of the adverse tenure decision was sent (App., pp. 21-a to 23-a).

The District Court Judge granted the motion.

The District Court held that the time within which Hellman had to file her EEOC Complaint began to run no later than March 28, 1972. The court rejected Hellman's contention that the use of different procedures whereby the Hellman and Hicks tenure denials were reviewed and the subsequent grant of tenure to Hicks in November, 1972, constituted ongoing discriminatory conduct (App., 11-a to 20-a).

"Under this theory," the court said, "in order to establish that defendants' discriminatory acts continued up to March 1, 1973, plaintiff would have to allege and prove that the manner in which her non-tenure decision was upheld differed discriminatorily from the manner in which the decision as to Hicks was reversed. But Plaintiff has failed to allege or otherwise even to create a genuine issue of fact by affidavit or other means in opposition to defendant's motion for judgment, that the *procedures* utilized by defendants in reviewing their decision denying plaintiff tenure departed from or in any way violated, defendants' established internal procedures."

The United States Court of Appeals for the Third Circuit affirmed.

The Circuit Court made the assumption that Hellman accepted the March 28, 1972, date as the date on which the EEOC time limit began to run and held that even if the EEOC time limits were computed from that date, this Court's decision in *Mohasco,* supra, rendered an EEOC complaint filed on January 26, 1973, untimely.

The Circuit Court, applying *Delaware State College v. Ricks,* 449 U.S. 250 (1980), held that the limitations period began to run when the original tenure decision was made and communicated to the affected party, and that the resort by Hellman to an internal review procedure could not toll the running of the time limit.

With regard to Hellman's primary argument, however, that the University engaged in an ongoing course of discriminatory conduct that included a discriminatory review procedure and culminated in a grant of tenure to Hicks, the Circuit Court stated that under *Ricks,* Hellman would have to have alleged that the manner in which her tenure denial was reviewed differed discriminatorily from the manner in which her male colleague's tenure denial was reviewed.

The Court concluded, however, that "Neither the allegation in Hellman's complaint nor any affidavits create an issue of fact regarding departure by the University *from its established internal review procedures.*" (emphasis added)

This Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

1. The Circuit Court has decided a federal Question in a way in conflict with applicable decisions of the Supreme Court.

In *Delaware State College v. Ricks,* 449 U.S. 250 (1980), this court said:

> In order for the limitation periods to commence with the date of discharge, Ricks would have had to allege and prove that the manner in which his employment was terminated differed discriminatorily from the manner in which the College terminated other professors who also had been denied tenure.

Ricks taught that a complainant, alleging a discriminatory discharge must identify "the discriminatory acts that continued until, or occurred at the same time of, the actual termination of his employment." 449 U.S. at 258.

In *Ricks,* this court cited with approval the decision of the Circuit Court of Appeals for the Ninth Circuit in *Abramson v. University of Hawaii,* 594 F.2d 202 (1979), which pointed out that independent acts of discrimination occurring *after* notification of the adverse tenure decision *could* form the basis of a Title VII claim.

Such an independent discriminatory act might occur, the *Abramson* court said, if the policy of the University included a normal and generally accepted tenure review decision process and if the University's refusal to review the tenure denial itself constituted a discrimination.

In the context of Respondents' Motion for Summary Judgment before the District Court, therefore, Hellman, under *Ricks* and *Abramson,* had the burden only of showing that a genuine issue of material fact existed with regard

to whether the review procedures followed by the University *after* notice to both Hellman and Hicks that they would not receive tenure differed discriminatorily and resulted in tenure for the male but not the female.

The Circuit Court held, however, that in order to prevail in this case, Hellman would have to allege and prove that her discharge or tenure review process differed from process which the University *ordinarily followed* in discharging or reviewing.

The Circuit Court held, as the District Court had held, that Hellman had failed in her case because she had failed to allege that the procedures used by the University in reviewing the tenure denial departed from or in any way violated the established internal review procedures.

Hellman contends, however, that the test enunciated by the Circuit Court was in error and in violation of the law related to ongoing discriminatory conduct as set forth by this Court. Hellman argues that her burden was to show that the manner in which her adverse tenure decision was reviewed differed discriminatorily from the manner in which the adverse tenure decision as to a similarly situated male employee was reviewed, and that the differing review process resulted in tenure for the male but not for her.

A review of the record, moreover, reveals convincingly that Hellman *in fact* showed that the review process for the male that resulted in tenure did *not* follow established procedures, and that while she was required to follow an established University tenure review procedure, the male was not.

Hellman contends that as a matter of law, the record before the District Court was sufficient to raise a substantial question of fact as to whether the University, through

its authorized agents, committed ongoing discriminatory acts by subjecting Hellman's tenure denial to a review process that differed from the process used to review the tenure denial of a similarly situated male employee whose tenure review resulted in a reversal of the denial and a grant of tenure, while Hellman's tenure denial was affirmed.

The differences in tenure review which resulted in tenure for the male employee and no tenure for the female were *more* than merely the ongoing effects of a past discrimination. Cf. *United Air Lines, Inc. v. Evans,* 431 U.S. 553 (1977).

The record of affidavits and documents submitted to the District Court indicates the following:

1. On or about February 14, 1972, both Hellman, the female employee, and Hicks, the male employee, were advised by Rosenberg that they had been denied tenure (App., pp. 29-a, 38-a, 42-a). Both requested that Rosenberg reconsider the denial (App., pp. 35-a, 38-a).

2. On or about March 28, 1972, Rosenberg formally confirmed his tenure denial as to Hellman (App., p. 29-a), but reversed himself as to Hicks and recommended Hicks for tenure. (R.R., p. 330).

3. On April 26, 1972, however, the Provost refused the recommendation of Hicks for tenure and instructed Rosenberg to so advise Hicks (App., p. 40-a). This was done on April 28, 1972 (App., p. 42-a).

As of April 28, 1972, therefore, Hellman had no cause of action under Title VII because no similarly situated male employee had been treated differently and better than

she had. Two employees, one male and one female, were out of their jobs at the end of the 1972-73 academic year.

Up to April 28, 1972, the normal University procedure had been followed, if one accepts Rosenberg's deposition testimony on this matter (App., pp. 31-a to 32-a).

Thereafter, however, the University began a course of discriminatory conduct culminating in a grant of tenure for Hicks, but not for Hellman.

Based on the facts contained in the record before the District and Circuit Courts, Hellman clearly raises a substantial question of fact with regard to the period during which her EEOC filing time limit began to run.

Both Hellman and Hicks sought to have their adverse tenure decisions reviewed (App., pp. 43-a, 44-a, 48-a).

Hellman is advised and instructed to follow the procedure to be pursued through the Tenure Promotion and Review Board (App., pp. 49-a to 50-a, 52-a).

On July 6, 1972, she *specifically* asks Rosenberg if there is any *other* avenue of appeal open to her (App., p. 48-a). She is told only that she may follow the Tenure and Promotions Review procedure, for which rules are just being implemented (App., pp. 49-a to 50-a).

In the meantime, Smith has confidentially re-opened the Hicks case (App., p. 44-a) in a procedure which does *not* appear to be part of the normal tenure review process.

In justification for this move, Smith qualifies his earlier evaluation of Hicks as one *not* deserving of tenure. He specifically instructs the acting chairman of the department of the factors on which evidence would have to be presented in order for Hicks to receive tenure.

Having specifically rejected Hicks teaching ability as sufficient for tenure in April, 1972 (App., p. 40-a), Smith directly instructs Albert that in order to win tenure for Hicks evidence must be offered on Hicks' teaching performance.

Hellman received no such instruction and no such opportunity.

Hellman contended to the District Court, to the Circuit Court, and now to this Court, that Respondents engaged in a course of discriminatory conduct by subjecting these two tenure denials to two different review procedures. One employee, the female, was instructed to follow one review procedure which could not and did not result in tenure. One employee, the male, was instructed to follow a different procedure which could and did result in tenure. The inference may be drawn, moreover, that the review of the male's tenure denial was *not* in accordance with established University procedure. The further inference may be drawn from the evidence that Hellman was qualified for tenure while Hicks was not.

The male received tenure on November 3, 1972. Until the male, instructed to follow a different review procedure than the female, received tenure in November, 1972, no discrimination could be charged to the University. Prior to that time, both employees, one male and one female, had been denied tenure.

In *Abramson,* the Court wrote, 594 F.2d at 209:

> A discriminatory refusal to reconsider a denial of tenure on or after March 24, 1972, can be viewed either as an additional discriminatory act or as the final denial of tenure.

Under the facts of that case, the faculty member was given an opportunity on remand to show that she had been discriminated against during the tenure denial review process since she had been refused a review of her tenure denial when other similarly situated faculty members had been granted routine review of their tenure denial.

Analogously, Hellman has created on the record a genuine issue of fact with regard to whether the grant of tenure to Hicks following one tenure denial review process was discriminatory as to Hellman who has not accorded the same review and who did not receive tenure.

Since it is the review process and subsequent tenure review decisions—favorable for Hicks, unfavorable for Hellman—which are the focus of Hellman's claim and *not* the original tenure denials, the time within which she had to file her EEOC Complaint did not begin to run until, at the earliest, Hicks received tenure.

Accordingly, Hellman's claim that she had been treated differently than Hicks, a less qualified, similarly situated male employee, could not be filed before November 3, 1972.

Since Hellman's complaint was, even under the rules set out in *Mohasco*, filed within 300 days of the discriminatory conduct, her complaint was timely and her lawsuit should not have been summarily dismissed.

CONCLUSION

For the foregoing reasons, this Honorable Court is requested to issue a writ of certiorari to the United States Court of Appeals for the Third Circuit to review the decision of that court which affirmed the summary dismissal of Petitioner's case.

Respectfully submitted,
FELDSTEIN GRINBERG STEIN McKEE

/s/ STANLEY M. STEIN

STANLEY M. STEIN, ESQ.
Attorney for Appellant

CERTIFICATE OF SERVICE

I, STANLEY M. STEIN, hereby certify that a true and correct copy of the foregoing Petition for Certiorari has been served on counsel of Appellees as follows:

JAMES J. RESTIVO, JR., ESQ.
MARTHA H. MUNSCH, ESQ.
MICHAEL J. BETTS, ESQ.
REED, SMITH, SHAW & McCLAY
747 Union Trust Building
Pittsburgh, PA 15219

Said copy was served by hand delivery on the *8th* day of May, 1985.

/S/ STANLEY M. STEIN

STANLEY M. STEIN, ESQ.
Attorney for Appellant